though in renewal,[21] or negotiable paper endorsed even to pay existing obligations.[22] Although an appearance entered by one partner after dissolution cannot bind the others,[23] presentment of commercial paper to one partner is sufficient,[24] and these conclusions are hard to reconcile. Some jurisdictions even permit one partner to borrow money to pay firm debts,[25] and to pledge the assets of the concern.[26] The most fruitful field for conflict, however, is raised when one partner after dissolution assumes to bind the others by an admission. An account stated by one partner has been held binding on the others,[27] the same conclusion being reached in considering the effect of an oral admission of liability,[28] while a part payment or promise to pay a firm debt has been held to toll the Statute of Limitations as to all members of the firm.[29] The weight of authority would seem to be contrary to each of these propositions,[30] and since a new obligation is created in each instance, this seems the sounder result. A detailed examination of the cases in the particular jurisdiction is the only safe course to pursue when it becomes necessary to deal with a firm known to be in liquidation.

LIABILITY OF A SURETY WHEN THE PRINCIPAL OBLIGATION IS UNENFORCIBLE.—The fundamental rule in the law of suretyship that no collateral liability can exist in the absence of a primary obligation, is but an inevitable step from the *a priori* proposition that the contract of a surety is an undertaking to answer for the debt, default or miscarriage of another.[1] Cases in which the defendant is sought to be charged as a surety, and pleads that there is no liability on the part of his principal, however, fall into three classes: first, where the principal has a defense inherent in the primary obligation itself, and the defendant

[21]Bank *v.* Norton *supra; cf.* Richardson *v.* Moies (1862) 31 Mo. 437; Abel *v.* Sutton (1800) 3 Esp. 108.

[22]Parker *v.* Macomber (Mass. 1836) 18 Pick. 505; Woodson *v.* Wood (1888) 84 Va. 478. Special power to endorse is not included in a power to use the firm name "in liquidation." Woodson *v.* Wood *supra.*

[23]Hall *v.* Lanning (1875) 91 U. S. 160.

[24]Gates *v.* Beecher (1875) 60 N. Y. 518.

[25]See Butchart *v.* Dresser (1853) 10 Hare 453; Estate of Davis (Pa. 1840) 5 Whart. 530. It must be noted that in both of these cases the court found actual authority from the other partners.

[26]*In re* Clough (1885) L. R. 31 Ch. Div. 324. In Breen *v.* Richardson (1883) 6 Colo. 605, a trust deed of realty was upheld.

[27]Feigley *v.* Whitaker (1872) 22 Oh. St. 606.

[28]See Davis *v.* Poland (1895) 92 Va. 225.

[29]Merritt *v.* Day (1875) 38 N. J. L. 32. But in some jurisdictions if the Statute has completely run, part payment by one partner cannot bind the others. See Parker *v.* Butterworth (1884) 46 N. J. L. 244.

[30]Account stated, see for example, Hart *v.* Woodruff (N. Y. 1881) 24 Hun 510; admissions, Nichols *v.* White (1881) 85 N. Y. 531; Statute of Limitations, Van Keuren *v.* Parmalee (1849) 2 N. Y. 523; Tate *v.* Clement (1878) 16 Fla. 339. The case last cited asserts that this is the rule irrespective of notice to former dealers. It would seem, however, that former dealers without notice can rely on part payments or promises made by one partner. Forbes *v.* Garfield (N. Y. 1884) 32 Hun 389; Sage *v.* Ensign (Mass. 1851) 2 Allen 245.

[1]See King *v.* Summitt (1881) 73 Ind. 312.

is, consequently, not liable; second, where the principal has a defense personal to himself, and the defendant is nevertheless responsible as a true surety; and third, where the cause is disposed of on purely equitable considerations. To the first class the general rule stated applies with full force, while the latter two classes constitute exceptions, which seem, in the last analysis, to be more apparent than real.

In *Backus* v. *Feeks et al.* (Wash. 1913) 129 Pac. 86, the surety defended on the ground that the promise of the principal was unenforcible because of the Statute of Frauds, but the court held him liable.[2] This decision accords with the general rule that a defense personal to the principal debtor is of no avail to the surety,[3] and it follows that the latter may not defeat his promisee by an allegation that the principal was an infant,[4] a lunatic,[5] a corporation acting *ultra vires*,[6] or a *feme covert*.[7] Although the defendant might be said to have undertaken that the principal was competent to contract,[8] he is nevertheless generally held as a true surety.[9] The line of cleavage between cases involving such defenses and cases in which the defendant shows circumstances undermining the foundation of the primary liability is clear,[10] and explains the rule that fraud in the primary obligation vitiates the responsibility of the surety.[11] On the ground that duress is a personal defense, however, most courts allow it to have no effect on the secondary undertaking.[12] The injustice and diffi-

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[2]See also Church *v.* Swanson (1901) 100 Ill. App. 39. The same conclusion should obtain in cases involving the Statute of Limitations. Ames, Cases on Suretyship, 137-*n*; but see Auchampaugh *v.* Schmidt (1886) 70 Ia. 642.

[3]Patti *v.* United Surety Co. (N. Y. 1908) 61 Misc. 445.

[4]Parker *v.* Baker (N. Y. 1839) Clarke Ch. 136; Wauthier *v.* Wilson (1911) 27 Times L. R. 582; *cf.* Baker *v.* Kennett (1873) 54 Mo. 82.

[5]Lee *v.* Yandell (1887) 69 Tex. 34; *cf.* Grove *v.* Johnston (1888) L. R. 24 Ir. 352.

[6]Remsen *v.* Graves (1869) 41 N. Y. 471; Yorkshire Ry. Wagon Co. *v.* Maclure (1881) L. R. 19 Ch. Div. 478.

[7]Kimball *v.* Newell (N. Y. 1845) 7 Hill 116; Nabb *v.* Koontz (1861) 17 Md. 283.

[8]See Erwin *v.* Downs (1857) 15 N. Y. 575; Otto *v.* Jackson (1864) 35 Ill. 356; Childs, Suretyship & Guaranty, § 131.

[9]Dexter *v.* Blanchard (1865) 93 Mass. 365; Scott *v.* Bryan (1875) 73 N. C. 582; Brown *v.* Bank (1895) 88 Tex. 265.

[10]Swift *v.* Beers (N. Y. 1846) 3 Den. 70; Sawyer *v.* Chambers (N. Y. 1864) 43 Barb. 622.

[11]Russell *v.* Annable (1871) 109 Mass. 72; Putnam *v.* Schuyler (N. Y. 1875) 4 Hun 166; Hagar *v.* Mounts (Ind. 1832) 3 Blackf. 57. Where the fraud renders the contract voidable at the option of the principal, the case might seem to be amenable to the *ratio decidendi* of the cases in which the principal is an infant. In the latter case, however, the voidability of the contract results from the operation of law, while the defect in the case of fraud is caused by the wrongful act of the creditor, of which he should be allowed no advantage, as indicated in the New York case.

For other examples, see Parshall *v.* Lamoreaux (N. Y. 1862) 37 Barb. 189; Gunnis *v.* Weighley (1886) 114 Pa. 191; Miller *v.* Gaskins (Miss. 1843) 1 Sm. & M. Ch. 524.

[12]Huscombe *v.* Standing (1608) 2 Cro. 187; Hazard *v.* Griswold (1884) 21 Fed. 178.

culties attending this result are manifest,[13] and it should be limited to cases in which the surety had knowledge of the duress, and nevertheless contracted to assure the obligation so induced.[14] The creditor merits no benefit from the surety's contract in any case of duress,[15] and especially when the illegal pressure is brought to bear on principal and surety alike.[16]

In the principal case the plaintiff leased premises for five years, the lessees executing a bond, with the defendant as surety, conditioned upon the performance of a covenant to pay rent contained in the lease. The lessees took possession, but subsequently abandoned the premises, leaving the accrued rent unpaid. In an action on the bond, the defendant pleaded that the lease was unenforcible because not duly acknowledged. The court, as an alternative ground for its decision, held that the surety was liable upon equitable grounds, regardless of whether the defense of the Statute of Frauds was purely personal to the debtor or not.[17] This holding typifies the kind of cases which treat the contract of suretyship as binding notwithstanding the invalidity of the obligation to which it was collateral, namely, cases based on considerations of a purely equitable nature. Where a person enters into a secondary undertaking with knowledge of a mere informality which renders the primary debt unenforcible, or of circumstances under which the operation of law invalidates it, he is presumed to have contracted intentionally with regard to the defect, and will not be heard to allege the absence of a primary liability.[18] He is liable, not strictly as a surety, but either because the elements requisite to an estoppel *in pais* are found to exist,[19] or because he is deemed to have made an independent and original promise.[20] Moreover, the creditor's claim may be justly due, yet unenforcible against the debtor, through no fault of the former, and it would then be inequitable to extend technical immunities to the surety.[21]

Undoubtedly a primary liability is essential to a contract of suretyship, and it is often laid down as a general rule that the extent of the principal obligation measures the responsibility of the surety. The principal case affords an apt illustration of the fact that this rule should not be taken too literally.[22] Perhaps no legal relationship lends itself more pliantly to the application of equitable principles than

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[13]Hawes *v.* Marchant (1852) 1 Curt. 136; Childs, Suretyship & Guaranty, § 133.

[14]Griffith *v.* Sitgreaves (1879) 90 Pa. 161; Pingrey, Suretyship & Guaranty, § 32.

[15]Strong *v.* Grannis (N. Y. 1857) 26 Barb. 122; Osborn *v.* Robbins (1867) 36 N. Y. 365.

[16]Griffith *v.* Sitgreaves *supra.*

[17]*Accord,* Adams *v.* Bean (1815) 12 Mass. 140; McLaughlin *v.* McGovern (N. Y. 1861) 34 Barb. 208.

[18]Sterns *v.* Marks (N. Y. 1861) 34 Barb. 565; Robbins *v.* Robinson (1896) 176 Pa. 341.

[19]Mason *v.* Nichols (1867) 22 Wis. 376; Holm *v.* Jamieson (1898) 173 Ill. 295.

[20]Stewart *v.* Behm (Pa. 1834) 2 Watts 356; Jones *v.* Thayer (1859) 78 Mass. 443; Weare *v.* Sawyer (1862) 44 N. H. 198.

[21]Adams *v.* Bean *supra;* Stewart *v.* Behm *supra;* Childs, Suretyship & Guaranty, § 136; *cf.* Russell *v.* Annable *supra.*

[22]1 Brandt, Suretyship, (3rd ed.) § 163.

that of suretyship. A defense set up against the creditor based upon the absence of any liability of the principal debtor will therefore be heard only when it is substantial, and not when it is predicated upon technicalities which would defeat the cause of fair dealing.

ADMISSIBILITY IN EVIDENCE OF THE OPINION OF NON-EXPERTS.—It has frequently been said that opinion is not evidence, and the rules whereby lay opinion is admitted are called exceptions to the general doctrine. It is, of course, clear that where all the facts and circumstances of a particular transaction can be detailed to a jury in such a manner that they may be enabled to draw reliable deductions therefrom, there is no need for opinion evidence, and such testimony should be excluded. Experience has shown, however, that many cases exist in which it is impossible by any description, however graphic, to place the facts before the jury so as to enable anyone but the witness himself to see or comprehend them, as they would have been seen or comprehended could the jury have occupied his position of observation. Clearly in such a case, the witness's opinion, even though he be a layman, is of the greatest assistance to the jury, and his testimony should be admitted.[1] It is this same principle of assistance to the jury which underlies the admissibility of expert testimony; the aid of a witness of peculiar skill is in some instances necessary to enable the jury to make trustworthy deductions. Although in England the opinions of laymen have long been admitted in evidence with great freedom,[2] the question of the admission of such evidence has proved extremely vexatious to the courts of this country and has given rise to innumerable shadowy distinctions and technical refinements.

The most prominent class of cases in which the question arises is that in which the opinion of non-experts is offered to prove sanity or insanity. Although in a few jurisdictions a lay witness may give his opinion after having merely testified to his opportunity for observing the person whose mental capacity is in issue,[3] the more general rule would seem to be that in order to render such evidence competent the witness must also lay before the jury the facts upon which his opinion is based.[4] Some jurisdictions lay down the above limitation seemingly as a testimonial qualification,[5] while others enforce it for the purpose of enabling the jury to decide intelligently how much weight should be given to the opinion introduced.[6] Since it is manifestly impossible to detail accurately all the subtle facts and circumstances which give rise to an opinion of imbecility, it seems clear that the latter view

[1]Evans *v.* People (1863) 12 Mich. 28, 35; Bates *v.* Sharon (1873) 45 Vt. 474.

[2]See Evans *v.* Blood (1746) 4 Bro. P. C. 557; Rex *v.* Oxford (1840) 9 C. & P. 525, 547; Trelawney *v.* Colman (1817) 2 Stark. N. P. 191. See also Hardy *v.* Merrill (1875) 50 N. H. 227.

[3]Hardy *v.* Merrill *supra;* see Grand Lodge *v.* Wieting (1897) 168 Ill. 408; Grimshaw *v.* Kent (1903) 67 Kan. 463; Abbott *v.* Comm. (1900) 107 Ky. 624.

[4]State *v.* Smith (1901) 106 La. 33; Shaeffer *v.* State (1895) 61 Ark. 241; The Berry Will Case (1901) 93 Md. 560, 580; State *v.* Cross (1900) 72 Conn. 722.

[5]State *v.* Smith *supra;* Shaeffer *v.* State *supra;* Prentis *v.* Bates (1892) 93 Mich. 234, 242.

[6]The Berry Will Case *supra.*